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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

LEWIS COHEN,

Petitioner,

vs.

THE STATE OF WISCONSIN,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Wisconsin

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PETITION FOR A WRIT OF CERTIORARI

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Petitioner prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of the State of Wisconsin entered on May 10, 1966.

CITATIONS TO OPINIONS BELOW

The official report of the opinion in the Supreme Court of the State of Wisconsin is reported in *State of Wisconsin* v. *Lewis Cohen,* 31 Wis. (2d) 97; 142 N.W. (2d) 161.

(Appendix A). The opinion of the Circuit Court of Milwaukee County, Criminal Division, the trial court herein, is set forth in the certified record filed herein on pages 101-105 of printed record.

JURISDICTION

The judgment of the Supreme Court of the State of Wisconsin affirming the trial court was entered on May 10, 1966. (Appendix A). Rehearing was denied on July 1, 1966. (Record, page 221). The federal questions sought to be reviewed herein were raised at the time of the rehearing herein. See pages 228 and 229 of supplemental return of record.

QUESTION PRESENTED FOR REVIEW

Whether the petitioner was denied due process and a fair trial when the Supreme Court of the State of Wisconsin affirmed his conviction in the court below, without a jury, of the crime of abortion upon evidence that involves a reasonable doubt as a matter of law as to his guilt.

CONSTITUTIONAL PROVISIONS AND STATUTE INVOLVED

Amendment V of the United States Constitution:

> No person shall . . . be deprived of life, liberty or property, without due process of law; . . .

Amendment VI of the United States Constitution:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of

the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

Amendment XIV of the United States Constitution:

Section 1 . . . nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Wisconsin Statutes, 1963:

Section 940.04(1) ABORTION (Appendix B)

STATEMENT OF CASE

This action was commenced by the issuance of a warrant and a complaint against the petitioner in October, 1963, followed by the filing of an Information by the District Attorney for Milwaukee County charging the petitioner with a violation of Section 940.04(1). (Appendix B). The case was brought to trial in the Circuit Court of Milwaukee County, Criminal Division, without a jury, on March 3, 1965 and after several lengthy delays the testimony was concluded on September 10, 1965. The petitioner was found guilty and sentenced to two years at the State Prison at Waupun by the trial judge acting as trier of the facts on October 27, 1965. The petitioner made a timely appeal to the Supreme Court of the State of Wisconsin which rendered its opinion on May 1, 1966 confirming the judgment of the court below. (Appendix A). The petitioner made a timely motion for rehearing and upon such motion for rehearing raised the federal questions of denial of due process and a fair trial to the petitioner as petitioner

contends is apparent from the opinion of the Supreme Court of the State of Wisconsin. (Appendix A). The motion for rehearing was denied on July 1, 1966.

THE EVIDENCE

The petitioner was a 71 year old licensed, practicing physician in Milwaukee, Wisconsin. Patricia Hanley, the woman involved came by railroad to Milwaukee from her home in Minneapolis with a woman companion and went to the doctor's office on April 20, 1963, the first and only time the petitioner saw her.

The petitioner testified that Miss Hanley came to Milwaukee because she did not want to go to a hospital in Minneapolis because of embarrassment with her family. He made a vaginal examination and found there were some blood clots and bleeding and that she was pregnant one to two months. The petitioner testified he recommended that she have a curettment by another doctor and that she be hospitalized. He testified that when he saw her an abortion was already underway.

Miss Hanley admitted at the trial that when she learned she was pregnant she wanted an abortion and that she made efforts of her own in Minneapolis to bring about an abortion before she came to Milwaukee. She testified, however, in behalf of the State that she came to Milwaukee to have an abortion performed by the petitioner.

There was a large amount of conflicting evidence in the case tending to affect the credibility of both the petitioner and also Miss Hanley and her girl companion who came to Milwaukee with her.

There were, however, a series of uncontradicted physical and medical facts which were put to the only two gyne-

cologists who testified in the case. Both gynecologists testified that in their opinion Miss Hanley was already aborting when she came to Milwaukee and also that if the petitioner had performed the acts upon her without an anesthetic to which she testified, she would have been in great pain and would have substantial and continuous vaginal bleeding immediately thereafter.

While Miss Hanley testified at the trial that she was not bleeding before she came to Milwaukee she gave a statement to the District Attorney before the trial when she was seeking to inculpate the petitioner that she was bleeding before she came to Milwaukee. She admitted at the trial that she had made the prior self-contradiction but neither she nor the prosecutor nor the trier of facts elicited any testimony from her as to why she made the prior self-contradiction of her trial testimony on the main point at issue in the trial, to wit: that she was bleeding vaginally before she came to the petitioner's office.

The uncontradicted physical and medical facts are set forth in the hypothetical question put to the two gynecologists in Appendix C. The unexplained prior self-contradictions of Miss Hanley are set forth in Appendix D.

REASONS FOR GRANTING WRIT

1. The difficulty of the proof of the crime of abortion and the greater difficulty of the defense against it is essentially the same as with regard to the crime of rape. The Courts have repeatedly approved Sir Matthew Hale's statements with respect to the crime of rape that "it must be remembered, that it is an accusation easily to be made and hard to be proved and harder to be defended by the party accused, though never so innocent;" and that we should "be the more cautious upon trials of offenses of this nature, wherein the Courts and jury may with so much ease be imposed upon without great care and vigilance; the heinousness of the offense many times transporting the judge and jury with so much indignation that they are overhastily carried to the conviction of the person accused thereof by the confident testimony sometimes of malicious and false witnesses." See *Cahill* v. *State,* 178 P. (2d) 657, p. 664 (1947).

2. The opinion of Justice Gordon of the Wisconsin Supreme Court (Appendix A) correctly aligns all of the *other* conflicting evidence in the case but he finally bases his decision upon the credibility of Miss Hanley as to whether she was bleeding before she went to the petitioner's office. (Emphasis supplied)

> "It is our opinion that conflicting evidence was presented to the trier of fact as to whether Miss Hanley had been bleeding before she went in to see the doctor and also as to whether there were blood clots formed prior to such visit. The version of the facts alleged by the appellant was sufficiently controverted so as to leave it peculiarly within the scope of the trial court whether to believe it or to disbelieve it." (Appendix, p. 218).

3. But Miss Hanley had stated to the prosecutor in the case in a statement made to him shortly before the trial: *"Well, I was bleeding before I went but I went in for the purpose of an abortion."* She admitted at the trial that she had so told the prosecutor. During the trial the prosecution did not ask for any explanation as to why she had made such a statement to him. It was the State's burden to prove every element in the case and to remove the prior self-contradiction or at least offer some explanation for it if it was possible for them so to do. But her position on the crucial point in the case was flatly contradicted and unexplainedly so by her prior statement to the prosecutor. (Emphasis supplied)

In *Wigmore,* Vol. III, 3rd Edition, Section 1018, page 686, it is stated:

> "Chief Baron Gilbert, Evidence, 147-150: 'Another thing that derogates from the credit of the witnesses, if upon oath he affirmed directly contrary to what he asserts; . . . and this *takes from the witness all credibility,* inasmuch as contraries can not be true . . . now that which sets aside his credit and overthrows his testimony is . . . the repugnancy of his evidence; if what he says be contradictory, that removes from him all credit; for things totally opposite can not receive belief from the attestation of any man." (Emphasis supplied).

Further in *Wigmore, supra,* Section 1018, page 687:

> "(a) Since, in the words of Chief Baron Gilbert, it is the 'repugnancy of his evidence' that discredits him, obviously the Prior Self-Contradiction is not used assertively; *i.e.,* we are not asked to believe his prior statement as testimony, and we do not have to choose between the two (as we do choose in the case of ordinary contradiction by other witnesses). We simply set the two against the other, perceive that both can not be correct, and immediately conclude that he has

> erred in one or the other but without determining which one. It is the repugnancy and inconsistency that demonstrates his error, and not the superior credibility of the prior statement. Thus, we do not necessarily accept his former statement as replacing his present one; the one merely neutralizes the other as a trustworthy one." See also *Wigmore, supra,* Section 902, page 392.

The trial court in Milwaukee erroneously, we contend, based its decision upon its conclusion "that the credibility of the chief witness for the State (Miss Hanley) is of the highest caliber." (Appendix, page 102) Justice Gordon rested his decision on the credibility of Miss Hanley. If her credibility on the crucial issue in the case is removed we respectfully contend that the whole case of the State falls. There would then be no credible evidence to prove her condition before she visited the petitioner and it is incumbent upon the State to prove what her condition was at that time.

4. In *Tot* v. *U. S.,* 319 U.S. 463, 473 (1943), this court stated:

> " . . . where guilt is in issue, a verdict against a defendant must be preceded by the introduction of some evidence which tends to prove the elements of the crime charged. Compliance with these constitutional provisions, which of course, constitute the supreme law of the land, is essential to due process of law, and a conviction obtained without their observance can not be sustained."

This court stated in *Mooney* v. *Holohan,* 294 U.S. 103, 112 (1934):

> "That requirements (of due process) in safeguarding the liberty of the citizen against deprivation through the action of the State, embodies the fundamental conceptions of justice which lie at the base of all civil and political institutions."

In *Brooks, et al.* v. *U. S.*, 164 Fed. R. (2d) 142 (C.C.A. 5th Cir., Ga., 1947) it is stated:

> " . . . due process as to each defendant required for conviction that the evidence be strong enough to exclude every other reasonable hypothesis than the guilt of the defendant."

In *Lisemba* v. *California,* 314 U.S. 219 (1941) this court said:

> "The aim of the requirement of due process is . . . to prevent fundamental unfairness in the use of evidence whether true or false."

In *Speiser* v. *Randall,* 357 U.S. 513, 529 (1958) this court said: "Due process requires the State to convict only upon sufficient proof."

In *Asaro* v. *Parisi,* 297 Fed. 2nd 859, 863-4 (C.C.A. 1st Cir., Mass., 1962) it was said:

> ". . . practical men and women jurors would almost inevitably . . . act upon the assumption that what a witness may have said soon after an event is far more likely to be accurate than what the witness might subsequently say, even in the court under oath."

For the above reasons we respectfully contend that the petitioner was convicted without benefit of the rule of reasonable doubt in criminal cases and therefore deprived of due process and of a fair trial in violation of his constitutional rights and that therefore a Writ should issue to the Supreme Court of the State of Wisconsin.

Respectfully submitted,

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